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Supreme Court of the United States

OCTOBER TERM, 1957.

No. 980

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deLESSEPS S. MORRISON, Individually and as Mayor of the City of New Orleans and PROVOSTY A. DAYRIES, Individually and as Superintendent of Police of the City of New Orleans,

Petitioners,

versus

ABRAHAM L. DAVIS, JR. and WILLIAM R. ADAMS,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

PETITION OF RE-HEARING.

ALVIN J. LISKA,
City Attorney,
Trial Attorney,
JOSEPH H. HURNDON,
Assistant City Attorney,
ERNEST L. SALATICH,
Assistant City Attorney,
JACK P. F. GREMILLION,
Attorney General for State of Louisiana,
WILLIAM P. SCHULER,
Assistant Attorney General for State of Louisiana.

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PETITION OF RE-HEARING.

Petitioners, deLesseps S. Morrison, individually and as Mayor of the City of New Orleans, and Provosty A. Dayries, Individually and as Superintendent of Police of the City of New Orleans, present their petition for a re-hearing of this Court's order dated May 26, 1958 denying the petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit, and, in support thereof, respectfully show:

GROUNDS FOR RE-HEARING.

The United States Circuit Court of Appeals for the Fifth Circuit erred in affirming the Summary Judgment rendered herein by the U. S. District Court for the Eastern District of Louisiana, as a substantial issue of fact had been raised by the pleadings.

A summary judgment is never warranted unless it is clear that no genuine issue as to any material fact remains for trial.

Chappell v. Goltsman, 186 Fed. (2d) 215;
Williamson v. T.S.C. Motor Freight, 203 Fed. (2d) 257;
Slagle v. U. S., 228 Fed. (2) 673.

Respondents brought this action pursuant to Rule 23 (a) (3) of the Federal Rules of Civil Procedure for themselves and on behalf of all other negro citizens similarly situated seeking common relief based upon common questions of law and fact.

The necessarily material elements of fact are that respondents are members of the negro race; that they are patrons of the public transportation facilities operated by the New Orleans Public Service, Inc.; and that as negroes they are segregated from white passengers using these public transportation facilities.

It is essential to the maintenance of a class action that there be an identity or community of interest between parties bringing the action and those in whose

behalf it is brought. The representative should be similarly situated, possess the same qualifications and must have an interest which is co-extensive with other members of the class. To maintain this action as a true class action, respondents must establish that they are members of the negro race and that they are users of the public transportation system of the City of New Orleans.

As proof of these material elements of the class action, brought by them, respondents have submitted only their own affidavits that they are members of the negro race and that they use and intend to use in the future the public transportation facilities of the City of New Orleans operated by New Orleans Public Service, Inc. No further evidence has been presented nor have petitioners been afforded an opportunity to establish anything to the contrary or to challenge these statements.

Until it is uncontrovertibly proven that respondents are in fact users of the public transportation facilities in the City of New Orleans they have no right to bring this action as representatives of a class which they have not proven themselves to be members of.

It is well established that class actions may be brought by one or more members representing the class, but in all instances such actions must be brought by persons similarly situated or possessing the same or similar qualifications as all other members of the class on behalf of which the action was brought.

Brown vs. Board of Trustees of LaGrange Independent School, 187 F. (2d) 20 (1951).

THE FIFTH CIRCUIT COURT OF APPEALS, in its opinion at p. 25, said:

> "All of these considerations, however, are completely beside the mark here, for plaintiff has wholly failed to plead or prove any deprivation of his civil rights and it is elementary that he has no standing to sue for the deprivation of the civil rights of others. What the Supreme Court said in McCabe v. Atchison T. & S. F. Ry. Co., 235 U.S. 151 at pages 161-162 and 164, 35 S. Ct. 69, 71, 59 L.Ed. 169 and quoted with approval in State of Mo. ex rel. Gaines v. Canada, 305 U.S. 337, 351, 59 S. Ct. 232, 83 L. Ed. 208, has precise application here:
>
> > 'It is the individual who is entitled to the equal protection of the laws, and if he is denied. . . a facility or convenience . . . which, under substantially the same circumstances, is furnished to another traveler, he may properly complain that his constitutional privilege has been invaded.
> >
> > 'There is, however, an insuperable obstacle to the granting of the relief sought by this bill. It was filed, as we have seen, by five persons against five railroad corporations to restrain them from complying with the state statute . . . It states that there will be "a multiplicity of suits", there being at least "fifty thousand persons of the negro race in the state of Oklahoma" who will be injured and deprived of their civil rights. But we are dealing here with the case of the complainants, and nothing is shown to entitle them to an injunction. It is an elementary principle that, in

> order to justify the granting of this extraordinary relief, the complainant's need of it, and the absence of an adequate remedy at law, must clearly appear. The complainant cannot succeed because someone else may be hurt. Nor does it make any difference that other persons who may be injured are persons of the same race or occupation. It is the fact, clearly established, of injury to the complainant—not to others—which justifies judicial intervention. . .
>
> '. . .The desire to obtain a sweeping injunction cannot be accepted as a substitute for compliance with the general rule that the complainant must present facts sufficient to show that his individual need requires the remedy for which he asks . . .'"

The rationale of decision of the Supreme Court of the United States in *Brown, et al. vs. Board of Education of Topeka,* 74 S. Ct. 686, 347 U.S. 483, 98 L.E. 873 seems limited to the conclusion that in the field of public education the doctrine of separate but equal has no place.

In reaching this conclusion the court considered the psychological effect of segregation on the negro student and determined that the policy of separating the races is usually interpreted as denoting the inferiority of the negro group, that a feeling of inferiority affected the motivation of a child to learn and therefore segregation in schools had the tendency to retard the educational and mental development of negro children.

It is difficult to conceive how separate seating accommodations on public transportation facilities can have

the same or even a similar effect on any segment or age group of the negro population.

Evidence can be adduced which will establish beyond contradiction that the facilities afforded to both negroes and whites on public buses and street cars in the City of New Orleans are on an equal basis.

Petitioners should be permitted to establish the complete lack of discrimination as to the negro passengers on the public transportation facilities of the City of New Orleans and to show the equality of facilities afforded both negro and white passengers on public vehicles.

No distinction is made between white and negro passengers at loading stations. Both negro and white patrons use the same exits and entrances without distinction. Any passenger may select a seat of his own preference or standing room to his liking on crowded vehicles and is not compelled to occupy only specific seats or standing space because of his race.

The transportation system in New Orleans is operated on a basis comparable to the transportation system of the City of Tallahassee, Florida, however, the system here is more favorable to the negro passenger for he may choose a seat to his liking rather than be confined to a reserved seat to which he is assigned by the bus operator.

Further, petitioners should be afforded the opportunity to present expert testimony indicative of the fact that there can be no detrimental psychological effect on the

negro as a result of affording separate but equal facilities on public conveyances.

If the psychological effect on the negro as a result of segregation in public transportation is a factor to be considered in outlawing segregation, certainly then the mental attitude of both negro and white passengers as to integration is an element for consideration before determining whether or not segregation on public vehicles should be abolished.

White and negro residents have for many years used the transportation facilities of the City of New Orleans on a segregated and equal basis and have done so in harmony.

The record in this case evidences no instances of negro passengers on public vehicles expressing discontent with the facilities afforded them, nor is there evidence of any arrests of negro citizens for refusing to ride on a segregated basis.

The history of public transportation in the City of New Orleans shows agreement and approval on the part of both negro and white citizens to a system operated on a basis of affording equal facilities.

The District Court erred in rendering summary judgment in this matter simply on the complaint and affidavits filed by plaintiffs and without viewing this problem as a whole by hearing evidence concerning the attitudes and desires of the average negro citizen con-

cerning separate but equal facilities on public transportation. It could develop that plaintiffs represent but a small segment of the negro population who desire a change in the seating arrangements on public vehicles whereas the majority of the negroes, as well as the white population, in the City might very well be completely satisfied with present arrangements and desire them to remain unchanged. Assuming this to be true, it is difficult to conceive that the will of this minority group should be imposed on the entire population of the City of New Orleans with the likely possibility of completely disrupting the entire social order.

CONCLUSION.

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted, and that, upon further consideration, writ of certiorari issue to the United States Court of Appeals for the Fifth Circuit.

ALVIN J. LISKA,
City Attorney,
Counsel for Petitioners,
JOSEPH H. HURNDON,
Assistant City Attorney,
ERNEST L. SALATICH,
Assistant City Attorney,
JACK P. F. GREMILLION,
Attorney General for State of Louisiana,
WILLIAM P. SCHULER,
Assistant Attorney General for State of Louisiana.

CERTIFICATE OF COUNSEL.

I, ALVIN J. LISKA, counsel for the above-named petitioners, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Rule 58, subdivision 2, of the Rules of this Court.

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ALVIN J. LISKA,
City Attorney,
Counsel for Petitioners.

PROOF OF SERVICE.

I, ALVIN J. LISKA, Counsel for petitioners and a member of the Bar of the Supreme Court of the United States, hereby certify that on this day I served copies of the foregoing Petition for Writ of Certiorari on A. P. Tureaud, Esquire, Counsel for respondents, by mailing a copy thereof, postage prepaid, addressed to his office at 1821 Orleans Avenue, New Orleans, Louisiana.

Dated this .... day of June, 1958.

.....
ALVIN J. LISKA,
City Attorney,
Attorney for Petitioners.